Statement by Rep. Jerrold Nadler
Committee on the Judiciary
Markup of H.R. 3313
"Marriage Protection Act of 2003"
July 14, 2004

Thank you, Mr. Chairman. Today we markup legislation of dubious constitutionality, and even more dubious wisdom, following four in a series of five hearings on the topic of same-sex marriage. We have already devoted more time in this committee to this topic than the means by which we might preserve our democracy if terrorists wipe out our entire government.

One would think that the possibility that somewhere a lesbian or gay couple might live out their years peacefully and happily were a greater threat to the future of the United States than al Qaeda.

Today, however, the topic is a very serious one. The hysteria over the marriage question has brought us to the point of considering a bill that would strip the federal courts of the jurisdiction to hear cases involving alleged violations of an individual's rights protected under the Constitution.

These proposals are neither good law nor good policy. Past attempts to restrict court jurisdiction have followed many civil rights decisions, including the reapportionment cases. Fortunately, cooler heads in Congress prevailed, and the decisions that gave rise to these outlandish proposals are now no longer controversial. Unless I am greatly mistaken, no one in this room would question the constitutional protection of one person - one vote.

No less a liberal icon than Barry Goldwater battled court-stripping bills on school prayer, busing and abortion, which were the big issues in those days. He warned his colleagues that the "frontal assault on the independence of the Federal courts is a dangerous blow to the foundations of a free society."

I trust that, decades from now, these debates will find their way into the textbooks next to the segregationist backlash, the court packing plan of the 1930s, and other attacks on our system of government.

But today's markup is, more than anything else, about the politics of a national election. Perhaps our sons and daughters were sent to Iraq based on a lie, perhaps millions of Americans are out of work and many more don't have access to a doctor, perhaps our seniors can't afford life protecting medications, but at least we can beat up on an unpopular minority.

As Paul Weyrich recently advised his conservative allies, "The president has bet the farm on Iraq. Given what the continued killing has done to the president's standing in the polls this far, it is a lead-pipe cinch that as we lead up to the first days of November, 2004, violence is going to be horrific." His solution? "Change the subject. Ninety-nine percent of the president's base will

unite behind him if he pushes the [marriage] amendment. It will cause Mr. Kerry no end of problems."

That may be crafty political advice, but it demonstrates a dangerous contempt for our system of government. It is the moral equivalent of advising conservative candidates to stand in the school house door, or in this case, the door of the marriage license bureau.

Our committee has also received compelling testimony, from a distinguished legal scholar, called by the majority, that this legislation is constitutionally suspect. Although Prof. Redish has taken the controversial position that Congress has almost unlimited power to modify court jurisdiction, he made clear that this power is not without limits. As Prof. Redish put it so well in his testimony:

> To be sure, several other guarantees contained in the Constitution – due process, separation of powers, and equal protection – may well impose limitations on the scope of congressional power. The Due Process Clause of the Fifth Amendment requires that a neutral, independent and competent judicial forum remain available in cases in which the liberty or property interests of an individual or entity are at stake .... The constitutional directive of equal protection restricts congressional power to employ its power to restrict jurisdiction in an unconstitutionally discriminatory manner.

Prof. Redish also had some sound advice for Congress: "Purely as a matter of policy, I believe that Congress should begin with a very strong presumption against seeking to manipulate judicial decisions indirectly by selectively restricting federal judicial authority .... to exclude federal judicial power to interpret or enforce substantive federal law undermines the vitally important function performed by the federal judiciary in the American political system. The expertise and uniformity in interpretation of federal law that is provided by the federal judiciary should generally not be undermined."

If there is any word that describes this legislation it is "discriminatory," both in its purpose and its effect. We have had four hearings so far on the subject of same-sex marriage. Any court reviewing this legislation will certainly look at what has been said in the legislative record. It is an unabashed record of hostility to a particular unpopular minority. This bill has only one purpose, to ensure that members of this group does not get its day in court to assert their rights. Would we ever suggest that any other group in our society should be expelled from the federal court system and left to wander every county courthouse in the country to try to vindicate their rights under the federal constitution?

Are state courts and adequate forum to protect federal constitutional rights? The majority does not think so when it's the rights of big corporation, but when it comes to the rights of families and their children, that's a different story.

Perhaps my colleagues have forgotten that, between the Judiciary Act of 1789 and the present day, we fought a civil war, and added the 14th Amendment to the Constitution. Our rights are federally guaranteed. That must mean that an independent federal forum must be provided to all citizens to get a fair hearing.

Mr. Chairman, it is our very system of government, and the constitutional checks and balances, that is under attack. If the Congress, by statute, can prevent the federal courts from applying the constitution to any subject matter, then the protections of an independent judiciary and a bill of rights will be no more than a puff of smoke. It will be unpopular minorities – whether religious minorities, political minorities, lesbians, or gays, or whoever is unpopular at the moment – who will lose their rights.

With all they hysteria and carrying on about "unelected judges," it is perhaps worthwhile to remember that those unelected judges are part of our system of government. It is how the authors of the Constitution saw fit to protect the rights of unpopular minorities.

As Hamilton said in Federalist 78: "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing."

Gay marriage doesn't threaten our future, but the evisceration of our constitution and bill of rights does. We are playing with fire, and that fire could destroy our nation.

Thank you, Mr. Chairman.